Supreme Court, U. S.
FILED
MAY 12 1977

No. 76-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents.*

BRIEF AMICUS CURIAE

IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. FILED ON BEHALF OF DISPATCH PRINTING COMPANY.

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OPINIONS BELOW

The opinion of the court of appeals (FCC App. A,[1] pp. 1-60) has not yet been reported. The Orders of the Federal Communications Commission (FCC App. B and C, pp. 61-158) are reported at 50 FCC 2d 1046 (1974) and 53 FCC 2d 589 (1975), respectively.

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[1] Amicus references to appendices are to those contained in the Appendix filed by the Federal Communications Commission to its petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977. (FCC App. D, p. 160.) The court of appeals granted a partial stay of its mandate on April 5, 1977 (FCC App. E, pp. 161-167). The Federal Communications Commission (hereinafter "the Commission") filed a petition for a writ of certiorari on April 22, 1977. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTEREST OF AMICUS CURIAE

The Dispatch Printing Company ("Dispatch") publishes *The Columbus Dispatch*, an independent daily evening newspaper, and *The Columbus Sunday Dispatch*, a Sunday newspaper, in Columbus, Ohio.[2] Dispatch owns all the stock of WBNS-TV Inc., licensee of WBNS-TV, Channel 10, in Columbus since 1951.[3] Dispatch shareholders also own RadiOhio, Inc. licensee of radio stations WBNS(AM) and WBNS-FM, Columbus, since 1934 and 1957, respectively.

After a seven year rulemaking proceeding, the Federal Communications Commission adopted rules forbidding the prospective formation of combinations of a newspaper and a broadcast station (radio or television) located in the same community,[4] but making the

[2] The *Dispatch* competes with a daily morning newspaper, *The Columbus Citizen-Journal*, published by the E. W. Scripps Company.

[3] Dispatch also owns WTHR(TV) in Indianapolis, Indiana.

[4] That is, ownership of a newspaper located within the city grade signal, *i.e.* primary service area of a commonly owned broadcast station. *See* 47 C.F.R. § 73.685, 73.315, 73.188. For ease of reference, such co-location is referred to herein as "in the same community."

rule not retroactive with respect to existing co-located combinations except in communities served by only one daily newspaper and one broadcast station.

In the case of one newspaper-one broadcast station communities, the Commission Order required one of the interests to be divested within five years. The court of appeals upheld the prospective portion of the rules (FCC App. A, p. 33), but invalidated the Commission's determination not to apply the cross-ownership rule retroactively. (FCC App. A, p. 60.)[5]

This decision, if upheld, would affect Dispatch substantially and adversely, by forcing it to divest either its newspaper or its broadcast stations in Columbus, unless it could make a showing of "special circumstances." (FCC App. A, p. 60.) The Commission rule invalidated by the court of appeals would have permitted Dispatch to retain its Columbus newspaper and broadcast stations, so long as the stations continue to serve the public interest.

Dispatch has obtained written consent of all the parties below to the filing of this brief as amicus curiae pursuant to Rule 42(1) of the Rules of this Court.[6]

[5] WBNS-TV participated in the Federal Communications Commission rulemaking proceeding, but was not an intervenor in the court below.

[6] Amicus also supports the petition for a writ of certiorari (No. 76-1521) filed May 2, 1977 on behalf of Channel Two Television Company, The Houston Post Company, Chronicle Broadcasting Company, KSL, Incorporated (Deseret News), Post-Newsweek Stations, Capital Area, Inc., The Washington Post Company, WHAS, Inc. (The Courier Journal and The Louisville Times).

ARGUMENT

This case involves an important question of public policy. If the decision below stands, patterns of ownership of newspapers and television-radio stations, which have served the public well for many years, will be transformed, without any action by Congress, and contrary to the judgment of the agency to which Congress has delegated the formulation of policy in this area. Such a massive change of policy, if it is to be done by the courts, should be imposed only after full plenary review by this Court.

In considering this case, it should be emphasized that it does not involve an ordinary controversy between two television stations, or a dispute between a single television station and the Federal Communications Commission. On the contrary, this is a rulemaking proceeding, where the Commission is engaged in what is clearly delegated legislative action. The court below has not decided that the Commission *cannot make* a particular rule because that rule would violate the law (as was unsuccessfully contended in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 395 U.S. 367 (1969), for example). What the court below has done is to *command* the Commission to make a particular rule chosen by the court. That is essentially legislative action. No case is known where the courts have mandated such action. (This Court refused to order the *adoption* of a legislative rule in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1972).) The issue whether such a drastic step, involving serious questions of the separation of powers, should be taken by the courts, presents a question of great public and

constitutional importance which should be reviewed by this Court.

The petitions filed in this case present a number of issues, which will not all be restated or reviewed here. The argument in this brief will focus on two questions which appear to be particularly relevant in assessing the significance of the decision below:

1. Does the decision of the court of appeals improperly usurp the function allocated by Congress to the Federal Communications Commission, in view of the fact that Congress assigned to the Commission, and not to the courts, the responsibility to determine the "public interest, convenience and necessity" in making broadcast licensing decisions and regulations?

2. Was the Commission acting within its delegated powers when it held that a change of its rules and practices with respect to cross-ownership of newspapers and broadcast facilities should be applied prospectively only, under all the circumstances, which it carefully reviewed, except in situations where a community had only a single newspaper and a single broadcast facility, and they were under single ownership?

The essence of the decision of the court of appeals—which cannot be escaped by quibbling about its wording, in various places, including a supplemental opinion on stay—is that it is "irrational" to make a distinction as to existing co-ownerships in multiple facility communities. That is something of a *tour de force,* which merits evaluation by this Court.

I.

The Congress Has Assigned the Determination of "Public Convenience, Interest and Necessity" to the Commission and Not to the Courts.

The Commission determined in making a rule that departed from prior practice that the public interest would be advanced by prohibiting future combinations of daily newspaper and broadcast stations in the same community, and breaking up within five years of such combinations in a community where there was no other media voice, but not the elimination of existing combinations in communities with other media outlets (FCC App. B, pp. 90-91).[7] The court of appeals, however, decided that "the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a showing of harm" (FCC App. A, p. 56) and therefore, that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest."[8] (FCC App. A, p. 60.) Lest there

[7] There is no disagreement between the Commission and the courts that the First Amendment objectives of preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 390 (1969), and fostering "the widest possible dissemination of information from diverse and antagonistic sources . . . ," *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), are essential to the public interest. What is at issue in this case is (1) the weight to be assigned to these objectives and (2) who is to assign it under the public interest provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 303, 303(r), 307, 309(a)(d)(h), 310 and 312.

[8] In basing this conclusion on its interpretation of the record evidence, the court of appeals appears to have forgotten this Court's requirement for proper judicial review:

"We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972). It is not a reviewing court's "function to weigh the evidence in support of these various points of view. [A court] should not, and indeed cannot, substitute its judgment for that of the Commission." *Mt. Mansfield Television, Inc.* v. *Federal Communications Commission*, 442 F.2d 470, 482 (2d Cir. 1971). Estimates and forecasts are the Commission's proper function. *Ibid* at 483.

be any doubt that divestiture was compelled, the court said in granting a stay of its mandate (FCC App. E, p. 167):

> "Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules [prohibition of cross-ownership], and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone [prospective cross-owners; existing cross-owners in one station, one newspaper communities; and all other existing cross-owners] would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt. . . .)."

The court's opinion leaves to the Commission authority to weigh competing public interest licensing considerations only in those instances where cross-ownership is not involved. Where cross-ownership exists, the court directs the Commission to withhold a license, in the absence of a showing that the cross-

ownership itself is in the public interest so strong as to rebut the "presumption . . . compelled" against it. (FCC App. A, p. 60.)[9]

Given the common assumptions of the Commission and the court that, within the inherent limits of the broadcast frequencies, an uninhibited marketplace for ideas and dissemination of information from diverse sources are essential ingredients of the public interest, the holding of the court of appeals is, in substance, simply a disagreement with the Commission's judgment on how best to achieve that goal. The court demands total divestiture now. The Commission, by permitting existing cross-ownerships, which it authorized through licensing, has opted for an evolutionary reduction of cross-ownership through conventional marketplace newspaper and broadcast station sales and exchanges.[10]

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[9] In a prior decision, the court of appeals held, in regard to competing license applications, that the Commission was entitled to consider diversification of control "in connection with all other relevant factors and to attach such significance to it as its judgment dictates." *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). In this case, the court has veered sharply from its view in *McClatchy* that the Commission should regard diversity as one of a number of public interest factors, and reversed its view that diversity is a factor to be weighed by the Commission in the exercise of its judgment and expertise.

[10] The inherent scarcity of the broadcast spectrum may require the exercise of judgment by the Commission so that there is not a cacophony of interfering voices. It does not, however, justify or compel divestiture of existing facilities based on some notion of economics or competition, particularly in light of recent advances in satellite, cable, microwave and other technologies. The implications of the scarcity argument do not cut with equal force in radio and television, in markets with three stations and markets with thirty, in markets which have their own local magazines and those which have none. All such substantive considerations were ignored by the court of appeals, which recites the word "scarcity" as a kind of unquestioned and unquestionable invocation of truth. But "scarcity" is but a way of introducing the concept of "value," which is, in this area, a judgment which Congress has specifically assigned to the Commission.

True, were broadcast frequencies as plentiful as soapboxes in Hyde Park, there would be no need for concern for diversity so long as free speech is guaranteed. But the public interest demands diversity of voices, *i.e.*, "outlets of self-expression," not diversity of ownership. "Voice diversity" and "ownership diversity" may in some cases go hand in hand; but in others they may not. This is why realization of the public interest in the effective use of the scarce broadcast spectrum is best achieved through rules devised on the basis of experience and expert judgment, rather than through rigid legalistic judicial logic.

The decision of the court of appeals substantially encroaches upon the Commission's Congressionally mandated responsibility, in violation of separation of powers. It transfers a basic policy judgment from the Commission to the courts.[11] In compelling divestiture in some 50 television markets and some 160 newspaper-radio combinations, many of which are located in the largest metropolitan markets, it creates a whole

[11] Competing public policy judgments are an "area where administrative judgments are entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1946). The court of appeals itself has said that an agency must have latitude to select policies deemed to be in the public interest (assuming consistency with law and legislative mandate). *Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied sub nom. WHDH, Inc.* v. *Federal Communications Commission*, 403 U.S. 923, *rehearing denied*, 404 U.S. 877 (1971). There the court of appeals characterized its role vis à vis an agency in furtherance of the public interest as a "partnership." Here, however, the partnership has been demolished and the court has taken over an improperly dominant role.

new pattern and structure for broadcasting in this country.

Congress has entrusted responsibility for regulating broadcasting to the Commission. "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, 'not niggardly but expansive.'" *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, supra,* 395 U.S. at 380, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). A reviewing court is "not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

Section 706(2)(A) of the Administrative Procedure Act requires that an administrative decision may not be set aside unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).[12] To make this finding, the reviewing court must consider whether the decision "was based on consideration of relevant factors and whether there has been a clear error in judgment."[13] *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974). An equally "venerable principle" is that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, supra,* 395 U.S. at 381.

[12] In this case, since the Commission's Order was based on thousands of pages of written evidence, including submission of one or more sets of comments and studies by some 200 parties, and a full 2½ days of oral argument by some 45 scheduled parties, the issues raised by the court of appeals' decision would be the same if it had relied for review authority on the "substantial evidence" requirement of 5 U.S.C. §706(2)(E) rather than §706(2)(A).

[13] One opinion indicates that the court of appeals believes this latter phrase was not intended to replace *sub silentio* the traditional arbitrary and capricious standard of review. *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1, 34-35, n.74 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

The Commission's decision weighed many relevant factors in addition to the recognized value of diversity" (FCC App. B, p. 94), including the potential impact of dislocation of existing service (FCC App. B, p. 93), the benefits of existing local ownership and involvement in broadcast operations (FCC App. B, p. 93), the potential deterioration of local programming service and quality resulting from high capital costs which purchasers of divested stations would be required to bear (FCC App. B, p. 93), the superior past performance of many cross-owners (FCC App. B, p. 93, n. 26), and the existence of competing media voic-

[14] This Court has stated that "the ability of a licensee to render the best practicable service to the community reached by its broadcasts" is "an important element of the public interest." *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940). Neither this Court nor the court of appeals has ever previously stated that diversity of information sources is of overriding importance in determining the public interest. Rather, the court of appeals has said that "avoiding concentration of control is such an important objective that the Commission must be accorded discretion in its choice of measures for its fulfillment." *Greater Boston Television Corp.* v. *Federal Communications Commission, supra,* 444 F.2d at 860. *See also McClatchy Broadcasting Co.* v. *Federal Communications Commission, supra,* 239 F.2d at 18. In its Order, the Commission used its discretion to determine that review of licensee performance at license renewal proceedings rather than divestiture was the appropriate measure. Ignoring its own statement, the court of appeals chose its own measure, divestiture.

es in affected communities (FCC App. B, p. 96). The Commission weighed these policy factors and struck a balance between no rule at all and ordering total divestiture. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *The Permian Basin Rate Cases,* 390 U.S. 747, 792 (1968). Even an administrative order that announces a new principle does not change the permissible scope of review. *Securities and Exchange Commission* v. *Chenery Corp., supra,* 322 U.S. at 207.

Within the context of "the vaguish, penumbral bounds expressed by the standard of 'public interest,' " it is a court's task to do no more than "to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953). Because "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty," a court "must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102. In short, the reviewing court may not usurp the function of the Commission and substitute its own judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416.[15]

[15] *See also Public Interest Research Group* v. *Federal Communi-*

The court of appeals ordered the Commission to adopt (FCC App. A, p. 60) a rule that would afford "controlling weight" to diversification. (FCC App. E, p. 167.) This Court has noted the impropriety of a reviewing court foreordaining through *ad hoc* determination an agency's orderly development of policy by commanding the adoption of its own views. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94 (1966); *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17 (1952). Such restrictions not only improperly impinge on the agency's duty to reconsider the entire case, *United States* v. *Saskatchewan Minerals, supra,* but also violate the "guiding principle . . . that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once again goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co., supra,* at 20. Contrary to this instruction, the court of appeals here itself determined what rule the Commission should promulgate on remand.[16] It found that the policy of

cations Commission, 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976): "We have no license to regulate broadcasting nor to impose our private views of the public welfare."

[16] "On review, the court may correct errors of law and on remand the Commission is bound to act upon the correction." *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940). As this Court has said, a court exhausts its Congressionally-granted powers when it has laid bare the Commission's error, and compelled obedience to its correction. It can not "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors . . ." *Id.* Similarly, the court of appeals can not write its perception of the proper relative weights to be assigned to diversity and divestiture into the statute

diversification must be given "controlling weight" (FCC App. E, p. 167). In so doing, it "usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co., supra,* 344 U.S. at 20."

Such judicial overreaching transgresses the boundaries of the separation of powers. How to achieve the mandate of a statute, and determining the particular means which will do so, are an "administrative not a judicial decision." *Federal Power Commission* v. *Idaho Power Co., supra,* 344 U.S. at 21.[16] Assailing a regulation as "arbitrary and capricious" as a means to contend that the regulation is unwise or cannot succeed is not permissible. In considering the Chain Broadcasting Regulations this Court said: "It is not for us to say that the 'public interest' will be furthered or retarded by the . . . regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 224.

in the guise of correcting purported Commission "irrationality." Even a decision of less than ideal clarity must be upheld if the agency's path is reasonably discernible. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 286. It has recently been said that this principle has been too often honored only in the breach. *See National Broadcasting Co., Inc.* v. *Federal Comunications Commission,* 516 F.2d 1101, 1159, n.8 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co., Inc.,* 424 U.S. 910 (1976) (Bazelon, J., dissenting from the order vacating the previous order granting rehearing *en banc.*)

[17] *See also National Association of Independent Television Producers and Distributors* v. *Federal Communications Commission,* 516 F.2d 526, 543 (2d Cir. 1975), where the court held that the Commission can not be compelled to adhere to an order with certain parts deleted by the court. Accordingly, it remanded the case to the Commission for reconsideration in light of the court's opinion.

[18] Judicial assumption of the ultimate policy decision in such cases is also "not conducive to the development of habits of responsibility in administrative agencies," *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 146. Nor is it conducive to orderly judicial administration.

II.

The Commission's Determination That Its New Rule Should Not Be Applied Retroactively in Cases Where One or More Other Media Voices Were Available in a Community Can Not Reasonably Be Said to Be "Irrational."

Having agreed that the Commission's prohibition of new cross-ownership was valid, the court below held that failure to give the prohibition retroactive effect and eliminate existing cross-ownership was "irrational." (FCC App. E, p. 165.) This extrapolation of the Commission's decision, assertedly based on logic, can not be supported.

Prospective-only application of Commission regulations is commonplace.[19] It has frequently been upheld by the courts. *See, e.g.:*

[19] In changing policies, previously approved non-conforming arrangements have frequently been grandfathered by the Commission. Other distinctions between prospective and retroactive applications of Commission regulations have frequently been made. *See, e.g., Revision of FM Broadcast Rules,* 23 P&F Radio Reg. 1801, 1831-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); *Distribution of Television Broadcast Signals by CATV Systems,* 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); *Cable Television Report and Order,* 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

The Commission has made similar distinctions in regard to new rules to promote diversification of ownership. *See e.g., Multiple*

Buckeye Cablevision Inc. v. *Federal Communications Commission,* 387 F.2d 220 (D.C. Cir. 1967) (grandfathering cable system importation of distant signals permissible in order to avoid unnecessary disruption of viewing habits);

United States v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956) (limitation on number of standard, FM and television stations upheld without requirement of divestiture);

National Broadcasting Co., Inc. v. *United States, supra,* 319 U.S. at 207 (prohibition of ownership of two stations in same area by one network and network ownership of stations in communities with so few stations or unequal coverage that competition would be restricted upheld without requiring divestiture of all such network-owned stations);

Committee for Open Media v. *Federal Communications Commission,* 533 F.2d 1 (D.C. Cir. 1976) (grant of grandfather status to cable system with fewer than 50 subscribers at effective date of Commission regulation requiring cable systems to have a certificate of compliance upheld);

Columbus Broadcasting Coalition v. *Federal Communications Commission,* 505 F.2d 320, 324 (D.C. Cir. 1974) (implicit approval of grandfathering interests which did not conform to "one to

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Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); *Hearings on Applications for Second VHF Station,* 3 P&F Radio Reg. 2d 909 (1964); *Interim Policy on Television Multiple Ownership,* 5 P&F Radio Reg. 2d 271 (1965); *Multiple Ownership of Television Broadcast Stations,* 12 P&F Radio Reg. 2d 1501, 1507 (1968); *Multiple Ownership of Standard, FM & TV Broadcast Stations,* 22 F.C.C.2d 306 (1970).

a market rule," First Report and Order, Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 F.C.C.2d 306 (1970));

Jefferson Standard Broadcasting Co. v. *Federal Communications Commission,* 297 F. Supp. 784, 785 (W.D.N.C. 1969) (recognition of grandfathering in regard to prohibition of improvement of broadcast television signals under common ownership).

An agency, of course, may give retroactive effect to a regulation, and indeed every new principle may have some retroactive effect, *Securities and Exchange Commission* v. *Chenery Corp., supra,* 322 U.S. at 203, but retroactivity is not compelled to make a regulation rational and valid. The usual question is not whether reason compels retroactivity, but whether retroactivity can meet the test of reasonableness. *See, e.g., General Telephone Company of the Southwest* v. *United States,* 449 F.2d 846 (5th Cir. 1971); *Niagara Mohawk Power Corp.* v. *Federal Power Commission,* 379 F.2d 153 (D.C. Cir. 1967); *Securities and Exchange Commission* v. *Chenery Corp., supra.* It stands logic and experience on its head to say that absence of retroactive operation is "irrational," particularly in a circumstance where the agency charged with administering a statute has found no harm to the public from limiting the application of an order to prospective operation.

In determining whether it is permissible—not mandatory—for an administrative agency to give retroactive effect to its actions, this Court has made clear that a balancing approach is required. "Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to le-

gal and equitable principles." *Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 203.

Because retroactive change of settled law carries the possibility of unfairness, retroactive application of new policies has been avoided on equitable principles by the courts and by administrative bodies.[20] "[C]hanges in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation." K. Davis, ADMINISTRATIVE LAW TREATISE, § 5.09, p. 352 (1958). The practice of the Commission in regard to cross-owned facilities had been well-settled when the Order in question was adopted. (FCC App. B, p. 90.)[21] No change in circumstances has occurred.

Legislation—to which rulemaking is most closely akin—also takes a prospective course. Legislative "grandfathering" has been upheld by this Court as an appropriate means to respond to "the felt need for regulating . . . through familiar legislative devices, while at the same time [satisfying] the dictates of fair-

[20] This Court, more than a century ago, disapproved retroactive changes in administrative practices. In regard to the past practice in the exercise of discretion in government departments, this Court said: "No such change of such usages can have retroactive effect, but must be limited to the future." *United States* v. *McDaniel,* 7 *Peters* 1, 14 (1833). In only one case has this Court even implicitly required the retroactive application of a regulation, *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607 (1944). That course was taken because of the peculiar circumstances of the case and the statute involved; it was not taken because retroactivity was deemed the only permissible "rational" course for the agency. Congress later superseded the court's decision in large measure. 61 Stat. 89 (1947), 29 U.S.C. § 261. *See also United States* v. *Sullivan,* 332 U.S. 689 (1948).

[21] *See also* n. 19, p. 15, *supra.*

ness by affording sanction to enterprises theretofore established." *United States* v. *Maher,* 307 U.S. 148, 153 (1939). Prospective-only legislation is consistent with a basic distaste for retroactive law-making rooted in concepts of due process and the common law. Because of this deeply held principle against retroactivity, ambiguous statutes are presumed, in the absence of contrary intent, to operate prospectively. *Hassett* v. *Welch,* 303 U.S. 303 (1938); *Claridge Apartments Co.* v. *Comm'r.,* 323 U.S. 141, 164 (1944) ("Retroactivity, even where permissible, is not favored, except upon the clearest mandate.") The court of appeals would reverse this presumption. It would require retroactivity even without a clear mandate or evidence to suggest it is required.[22]

This Court, too, has chosen not to require state courts to give their decisions retroactive effect. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). It has also chosen not to give its own decisions retroactive effect.[23] For example, this Court has held that embezzled funds were income, but limited that holding to prospective effect only, *James* v. *United States,* 366 U.S. 213 (1961). In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), this Court held that the exclusionary rule enunciated in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), did not apply retroactively to state court convictions which had become final before *Mapp* was

[22] More often, courts have prohibited rather than required retrospective application of new agency rules, recognizing the inherent posibility of unfairness. *Retail, Wholesale and Dept. Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB* v. *E&B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960).

[23] *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L.REV. 632 (1967).

decided. A similar result was reached in regard to the *Miranda* and *Escobedo*[24] decisions in *Johnson* v. *New Jersey*, 387 U.S. 719 (1966); in regard to the *Wade* and *Gilbert* decisions[25] in *Stovall* v. *Denno*, 388 U.S. 293 (1967), and in regard to the *Griffin* decision[26] in *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406 (1966). The Court recently followed this pattern in deciding that the *Miller*[27] definition of obscenity would be applied prospectively only. *Marks* v. *United States*, decided March 1, 1977.

State courts have also overruled decisions with prospective-only application of their holdings. Such prospective overrulings have dealt with governmental,[28]

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[24] *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (exclusion of in-custody statements unless notice of Fifth Amendment rights given); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (defendant's statement in custody made without opportunity to consult counsel or warning of right to remain silent can not be used in trial against him).

[25] *United States* v. *Wade*, 388 U.S. 218 (1967) (pre-trial line-up identification, at which accused did not have counsel, must be excluded); *Gilbert* v. *California*, 388 U.S. 263 (1967) (in-court identification of accused must have source independent from line-up identification obtained in the absence of counsel).

[26] *Griffin* v. *California*, 380 U.S. 609 (1965) (prosecutor forbidden to comment adversely on defendant's failure to testify in state criminal trial).

[27] *Miller* v. *California*, 413 U.S. 15 (1974) (setting new standards to isolate "hard-core pornography" from speech protected by the First Amendment).

[28] *See e.g., Dawson* v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

charitable[29] and intra-family[30] immunity for torts, and with allocation of income between life tenant and remainderman.[31] There have been other prospective overrulings as well.[32]

The principle that a court may limit its decision to prospective applications only does not rest on a distinction between civil and criminal litigation. *Linkletter* v. *Walker, supra*, 381 U.S. at 627. "[T]he accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." *Linkletter* v. *Walker, supra*, 381 U.S. at 628.

Prospective-only application of administrative regulations is no more and no less irrational than is prospective-only court decision, or prospective-only legislation.

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[29] *See e.g., Burns* v. *Owens*, 459 S.W. 2d 303 (Mo. 1970); *Parker* v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960); *Kojis* v. *Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131, *modified on rehearing*, 107 N.W. 2d 292 (1961).

[30] *See e.g., Vickers* v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968); *Schwartz* v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971); *Fountain* v. *Fountain*, 214 Va. 347, 200 S.E. 2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974); *Balts* v. *Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966); *Goller* v. *White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).

[31] *See e.g., Langdell* v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956).

[32] For other examples of state court prospective-only rulings, *see* Comment Note, 10 A.L.R. 1371 (1966).

CONCLUSION

The questions raised by the petition are of great substantive importance, and of great importance to the sound development of administrative law. The petition for certiorari should be granted.

Respectfully submitted,

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May, 1977